Justices Uphold FBI Break-Ins To Plant 'Bugs'

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Congress implicitly authorized FBI agents to break into private property when necessary to plant "bug," even when they lack warrants specifically approving such tresspassing, the Supreme Court ruled in a 5-4 decision yesterday.

The lawmakers recognized that without covert entry "almost all" of the electronic eavesdropping they were approving in a 1968 law "would be impossible," Justice Lewis F. Powell Jr. wrote in the opinion for the majority.

He acknowledged that the Omnibus Crime Control and Safe Streets Act does not "explicitly" authorize breaking and entering by federal law enforcement officers whose warrant merely allows electronic surveillance.

But, Powell said, the law's "language, structure, and history . . . demonstrate that Congress meant to authorize courts—in certain specified circumstances—to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances."

The opinion drew a stinging dissent from Justice John Paul Stevens, whose opinion was signed by Justices William J. Brennan Jr. and Thurgood Marshall. In addition, Brennan wrote

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a separate dissent, with which Justice Potter Stewart agreed in part.

The FBI agents who broke into the Linden, N.J., office of Lawrence Dalia, a suspected receiver of stolen goods, had neither legislative nor judicial sanction and therefore violated the constitutional guarantee against unreasonable searches, Stevens wrote.

Until Congress says otherwise, he continued, "our duty to protect the rights of the individual should hold sway over the interest in more effective law enforcement."

Noting the absence of explicit language in the law for warrantless covert entries, Stevens said "the structural detail of this statute precludes a reading that converts silence into thunder."

Moreover, Stevens said, "the entire legislative history" of the law's Title III permits "only one relevant conclusion. . . . The legislators never even considered the possibility that they were passing a statute that would authorize federal agents to break into private premises without any finding of necessity by a neutral and detached magistrate."

In a telephone interview yesterday, G. Robert Blakely, the principal draftsman of the law, said that the majority view is correct even though the printed legislative history doesn't show a congressional intent to let a warrant imply approval of a break-in to implement an approved bugging.

At the staff level, said Blakely, now a Cornell University law professor, there was discussion of the possibility of writing into the law a clause specifically authorizng courts to allow break-ins. But because such a clause might have generated controversy that could have damaged the bill, the idea was discarded, he said. Consequently, the language was deliberately made broad enough to permit precisely the kind of interpretation that powell gave it, he added.

In a separate dissent, Justice Brennan said that even if Title III is read to authorize break-ins, "the Justice Department's present practice of securing specific authorization is not only preferably, but also constitutionally required."

The American Civil Liberties Union denounced the decision as "a very dangerous" one that "strikes at the right of privacy and the rule of law."

The case began in 1973 when the Justice Department got an order from a U.S .District Court judge to inter- a U.S. District Court judge to interhad probable cause to believe that he was a member of an interstate conspiracy to steal fabrics.

On an April night, three FBI agents pried open a window of Dalia's office, spent three hours in the building, and left after planting a bug in the office ceiling. Several weeks later, they returned at night to remove the device.

The order did not explicitly authorize the break-in.

Dalia sought to have the evidence from the bugging suppressed, but lost in the trial court and the 3rd U.S. Circuit Court of Appeals.

In the Supreme Court opinion, Justice Powell wrote that Congress "did not explicitly address the question of covert entries . . . only because it did not perceive surveillance requiring such entries to differ in any important way from that performed without entry," that is, "covert tapping of one's telephone. The invasion of the privacy of conversation is the same in both cases."

trict, Southern California Edison Co. and Tucson Gas and Electric Co.

The justices reversed a New Mexico Supreme Court ruling that the tax law was valid. The power companies successfully argued before the justices that the tax was preempted by a 1977 federal tax law.

"There is no indication that Congress intended to prevent (New Mexico) from taxing the generation of electricity," Stewart said.

"But the generation of electricity to be sent to Phoenix causes no more problems than the generation of electricity to be sent to Albuquerque. Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in either city, tax it equally for each."